

The Impact of the Internet on School District Liability

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I. What Risks Do Schools Take When Using the Internet in School

The Internet can provide significant teaching tools to educators in expanding students' learning experiences. For instance, some elementary school teachers have implemented monitored web logs ("blogs")¹ for their classes as a way to encourage their students to express themselves in writing and to encourage discussions outside the classroom following up on issues raised during class. See Jeffrey Selingo, "In the Classroom, Web Logs Are the New Bulletin Boards," *The New York Times*, Aug. 19, 2004. Yet, using the Internet as a teaching tool or merely providing students with Internet access to use any time may expose schools to risks of legal liability.

A. Loss of Certain Federal Funding for Failing to Filter Internet Access

Under the Children's Internet Protection Act ("CIPA"), 47 U.S.C. § 254, elementary or secondary schools with Internet access can qualify for certain federal funding only if they submit annual certifications to the federal government that they have implemented an Internet safety policy² to prevent students from accessing inappropriate content on the Internet.³ The CIPA further requires that schools' Internet safety policies be implemented on all computers accessible by minors through technological solutions, including filtering software. *Id.* § 254 (h)(5)(B)(ii). Moreover, although the CIPA also requires schools to restrict adults' use of the school's Internet

¹ A "blog" is "a personal Web site that provides updated headlines and news articles of other sites that are of interest to the user, also may include journal entries, commentaries and recommendations compiled by the user; also written web log, Weblog; also called blog." *Webster's New Millennium Dictionary of English* (2003) (available at <http://www.dictionary.com>).

² CIPA requires the Internet safety policy to apply to student use of the World Wide Web, e-mail, chat rooms, and "other forms of direct communications," which may include instant messaging. *Id.* § 254(e). The policy must also address unauthorized access (*i.e.*, hacking), and unauthorized disclosure of minors' personal information. *Id.*

³ "Inappropriate content" under CIPA includes material that is obscene, comprises child pornography or is "harmful to minors." CIPA, 47 U.S.C. § 254 (h)(5).

access to block obscene content or child pornography,⁴ *id.* § 254 (h)(5), there is an exception allowing an adult to have the filtering software disabled “to enable access for bona fide research or other lawful purposes.” *Id.* § 254 (h)(5)(D).

If a school cannot provide the necessary certifications to the government within two years of the effective date of the Act (*i.e.*, no later than April 22, 2002),⁵ the school “shall be ineligible for services at discount rates or funding in lieu of services at such rates ... until such time as such school comes into compliance” with this provision. *Id.* § 254 (h)(5)(E)(ii)(II).

The CIPA is not the perfect solution to prevent students from accessing inappropriate content on the Internet, and it does not fix the technological problem of over-filtering,⁶ but it goes a long way toward maximizing the educational value of the Internet and minimizing educationally-inappropriate content. Accordingly, even if the receipt of federal funding is not a concern for a particular school district, providing some mechanism for filtering Internet content accessed during school hours or using school equipment is prudent.

⁴ Although CIPA was initially declared unconstitutional to the extent that it required public libraries to impermissibly restrict adults’ access to the Internet, *Am. Library Ass’n, Inc. v. U.S.*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), the Supreme Court in a plurality opinion reversed. *U.S. v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 214 (2003). After the decision, the CIPA’s regulation of schools providing Internet access to their students remains unchallenged.

⁵ *Id.* § 254 (l)(4) (identifying effective date as “120 days after December 21, 2000”).

⁶ Depending on the technological tools chosen to implement the Internet safety policy, and the decisions reached by the school board about what level of human oversight such technology requires, Internet access may be inappropriately over-filtered. For instance, a student studying some aspect of breast cancer research may be blocked from accessing web sites about the topic because of the frequent use of the word, “breast,” a word commonly filtered using purely technological controls. *Am. Library Ass’n, Inc.*, 201 F. Supp. 2d at 406 (in the context of filtering at public libraries, the court concluded that “[e]ven though some filtering programs contain exceptions for health and education, the exceptions do not solve the problem of overblocking constitutionally protected material,” including material discussing breast cancer research), *rev’d*, *U.S. v. Am Library Ass’n, Inc.*, 539 U.S. 194, 209 (2003) (discounting the lower court’s concern about overblocking, concluding that “[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which [library] patrons may have the filtering software disabled”). As result, schools that implement technology filters should make efforts to review the scope of the filters to minimize the blocking of web sites that have valid educational content and permit the technology controls to be overridden when appropriate.

B. Liability for Failing to Stop Peer-to-Peer Harassment

Some students might use school property (such as computers and school e-mail) as a tool to harass, bully or threaten other students or educators. Both students and educators are entitled to protection while at school from being harassed or otherwise harmed, if such harm can be reasonably prevented. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (concluding that schools “have a duty to prevent the occurrence of disturbances” in the context of prohibiting students from wearing buttons in support of teacher strike); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (concluding that parents and “school authorities acting *in loco parentis* [have an obvious concern] to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech” that a student delivered during a required school assembly).

In the context of the Internet, peer-to-peer harassment can occur in many ways. Students can spread gossip or rumors in blogs or chat room conversations that are the topic of conversation the next day at school. *See* Amy Harmon, “Internet Gives Teenage Bullies Weapons to Wound From Afar,” *The New York Times*, Aug. 26, 2004. They can take unflattering pictures of their classmates using their camera-cell phones and circulate them among their friends in an instant. *Id.* They can also send a barrage of insulting instant messages to a fellow student, subjecting that student to repeated emotional attacks. *Id.* It appears that courts have not addressed school district liability in the context of harassment between students that occurs over the Internet. The issue of school district liability for in-person peer-to-peer harassment has been frequently litigated, *see* Sheryl L. Brown & Catherine Merino Reisman, *Potential Bases for Section 1983 Claims* (included in the seminar materials for this course), and may provide some guidance to this analysis.

For instance, if a school board fails to intervene to stop in-person peer-to-peer sexual harassment in its school, that school may face liability under Title IX of the Education Amendments of 1972 (“Title IX”)⁷ if that failure to act created an “intimidating, hostile, offensive and abus[ive] school environment.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 636 (1999). In *Davis*, a fifth-grade female student was subjected to many months of repeated, sexually-suggestive harassment by a fifth-grade classmate. *Id.* at 633-34. This repeated assault caused the victim’s previously high grades to drop and was the suspected basis for a suicide note her father found in her room. *Id.* at 634. The *Davis* Court concluded that the school board acted with deliberate indifference to the harassment, and that the harassment was “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Id.* at 633. Accordingly, the Court held that the school board was liable under Title IX for failing to prevent the repeated student-to-student sexual harassment. *Id.* at 650.

Moreover, monetary damages are available under Title IX only when the harassment constitutes “overt, physical deprivation of access to school resources,” *id.*, and exceeds mere “[i]nsults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.” *Id.* at 651-52 (excluding damages for “simple acts of teasing and name-calling among school children”).

Again, while there appears to be no case specifically addressing the application of cases analyzing Title IX in the context of in-person peer-to-peer harassment to the world of the Internet, it is reasonable to believe that the standards imposed by the court on a school district’s responses to peer-to-peer harassment in person may apply in the online context, such that school

⁷ Codified as amended at 20 U.S.C. §§ 1681-1688 (2004).

districts may be liable if they fail to prevent peer-to-peer harassment about which they have knowledge and which is severe enough to cripple the “victim’s” educational opportunities.

C. Liability for Censoring Student Speech

In addition, should a school take too hard a line on student discipline for threatening or harassing behavior, it risks over-restricting the students and being accused of violating students’ First Amendment rights. This issue is typically raised in the context of a Section 1983 lawsuit, alleging that the school board violated the student’s civil rights under 42 U.S.C. § 1983, a topic which is discussed in more detail in Section III, below.

D. Responding to Subpoenas for Students’ Copyright Infringement

To the extent that a school board elects to provide Internet access to its students, particularly to the extent that such access is permitted from a student’s home after normal school hours, the school board should be prepared to deal with subpoenas for information about subscribers to its network if students are apt to distribute, download or trade in copyrightable works (such as digital music or software). *See* Bill House, Monica Mendoza and Brent Whiting, *Deer Valley Pupils Unlikely FBI Target*, *The Arizona Republic*, Apr. 23, 2004, available at <http://nsba.org>. The *Deer Valley* article reported on the service of a sealed subpoena on a public school district in Arizona that related to illegal downloading and sharing of copyrighted materials, presumably by students using the school’s computers. *Id.* U.S. Attorney General John Ashcroft is reported to have concluded that:

Our educational institutions have access to very high speed and good computer capacity, and the ability to move things digitally. So, it’s not surprising to me that there may be individuals who would seek to use those kinds of access points into the (pirating) system.

Id. No further reports about this subpoena are available, but this report suggests that even though school districts themselves may be unlikely to be held liable for merely providing the Internet

access that permits students to infringe copyrighted works,⁸ they may be called upon to respond to a subpoena seeking the identities of particular users of the school's computer systems in aid of an investigation of copyright infringement.

II. Torts That May Arise From Internet Use

Personal injury or injury to real property is not the typical result of students' misuse of the Internet. Instead, Internet torts are more likely to occur in the context of reputational or financial harm. An individual's reputation can be damaged through defamatory statements circulated by e-mail, posted on a bulletin board or a chat room, or added to a "blog." To date, it appears that no court has issued an opinion holding a school district liable for torts relating to Internet use.

A. Defamation

Generally, a statement is defamatory when it "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Redco Corp. v. CBS*, 758 F.2d 970, 971 (3d Cir. 1985) (citations omitted). While it seems that courts have not held that school districts should be liable for defamatory statements made by their students,⁹ the fact that schools have been permitted to regulate student speech under certain circumstances suggests that courts may ultimately conclude that schools

⁸ Under the Online Copyright Infringement Liability Limitation Act (codified at 17 U.S.C. § 512), a school district that merely acts as an Internet service provider ("ISP") may not be liable for monetary damages or, in some circumstances, injunctive or equitable relief for its students' copyright infringement activities. Specifically, if all that the school district does is provide the technological systems (*e.g.*, the computers, the network, the phone line, etc.) that enable the students to distribute, download or otherwise trade in copyrightable works, the school district will not be liable for copyright infringement under the Act. 17 U.S.C. § 512(a). In contrast, if the school is more involved than merely transmitting the content or temporarily storing it as it makes its way out of the school's network and out into the Internet at large, then this provision of immunity from liability as an ISP will not apply. *Id.* (clarifying that the mere transmission of data does not create liability for an ISP as long as the data are not "modified" or retained on the network as copies following the completion of the transmission).

⁹ This article does not address a school district's potential liability for defamatory statements made by its teachers.

have a larger obligation to stop defamatory statements made by students, at least while the students are within the control of the school. See Section III, below, for a discussion of the cases permitting school districts to regulate student speech and the circumstances under which such regulation might be appropriate.

B. Negligence

Children can be exceptionally cruel to their peers, and perhaps more so in the sanitized environment of the Internet, where users frequently believe their comments and actions are anonymous. See Chuck Carroll, “Parents Urged to Track Students’ Internet Use; Online Activities Linked to Disciplinary Incidents, Principal Says,” *San Jose Mercury News*, May 8, 2003 (commenting that “students seem emboldened by the Internet’s easily donned cloak of anonymity”). “To a large degree, psychologists say, teenagers are being tripped up by the same property of the Internet that has compelled many adults to fire off an e-mail message they later regret: the ability to press ‘send’ and watch it disappear makes it seem less real.” Harmon, *supra*. To make matters worse, teenagers are particularly prone to speaking first and thinking later. This lack of impulse control may only exaggerate the effects of abrasive communications and the resulting emotional or psychological damage suffered by the “victim.”

Can schools be held liable for the actions of cyberbullies that result in reputational harm to other students? While there is no case directly holding that a school district has an affirmative duty to prevent students from defaming one another, it may well be that if the school district had notice of the harassment or defamation and there was evidence that the conduct was causing a substantial disruption in the school environment, the school’s failure to act to prevent resulting

physical harm (*i.e.*, a Columbine-like school shooting) may rise to actionable negligence.¹⁰ *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001) (questioning why teachers and administrators “missed telltale ‘warning signs’” of outbursts of violence at schools like Columbine, Thurston, and Santee and “why something was not done earlier and what should be done to prevent such tragedies from happening again”); *see generally Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (discussing students’ abilities to wear armbands to school in protest of the Vietnam war, and setting standard for “substantial disruption” sufficient to permit restriction of student speech); Richard Fossey & Jeff Horner, “Student Misconduct Involving the Use of Technology,” 179 Ed. Law. Rptr. 1 (Sept. 25, 2003); Renee L. Servance, “Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment,” 2003 Wisc. L. Rev. 1213 (2003).

III. Liability Resulting from Censorship of Student Speech

Censorship is antithetical to the First Amendment rights of free expression recognized by the U.S. Constitution. Yet, courts have strongly supported a school’s right to regulate certain conduct (including student speech in appropriate circumstances) when such regulation is necessary to maintain control over the school’s disciplinary environment, to protect the safety of other school students and educators, or to comply with the school’s mission of providing an education to its students. *See Tinker*, 393 U.S. at 513 (concluding that students’ free speech rights are not absolute); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“We have nonetheless recognized that the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings,’ . . . and must be ‘applied in

¹⁰ In Pennsylvania, in order to maintain an action for negligence against a public district, a plaintiff would have to demonstrate that their claims fell within an exception to the Tort Claims Act, 42 Pa. C.S.A. § 8542(b). At the present, there is no exception within the Act that would permit an action for negligence against a school district for failing to stop peer-to-peer harassment or for failing to sanction students’ defamatory statements.

light of the special characteristics of the school environment.’’); *Fraser*, 478 U.S. at 682 (same). As a result, schools must balance the need to maintain a safe, controlled environment dedicated to promoting education with their students’ and educators’ rights to express themselves freely.

A. Schools May Censor if Needed to Protect School Discipline

In 1969, the Supreme Court considered the extent to which schools could discipline students for their political expression and found that schools may not regulate student speech without demonstrating that such regulation is necessary to avoid “material and substantial interference with schoolwork or discipline.” *Tinker*, 393 U.S. at 511 (holding that school’s discipline of students for wearing black armbands to school in protest against the Vietnam War was “not constitutionally permissible”). The Court explained that, “In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Id.* Although this case was not decided within the context of Internet communications, it sets the tone for the development of courts’ approaches to responding to censorship in schools, including censorship of Internet communications.

Most recently, this standard has been applied to communications made by or among students using the Internet to reaffirm schools’ abilities to regulate student speech when necessary to preserve school discipline. *See J. S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002) (student discipline can be upheld if student’s conduct on student-authored website caused a “substantial disruption” and if the school was “adversely impacted”); *see also Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 829-30 (7th Cir. 1998) (concluding that discipline of student who communicated instructions to others about how to invade school’s computer systems – by “hacking” – and encouraged others to do so was appropriate because of school’s “reasonable fear” of “substantial disruption” to its computer network).

In *J.S.*, an eighth-grade student created a personal website on his home computer that was critical of his school teachers. 807 A.2d at 851. On this site, he made “derogatory, profane, offensive and threatening comments, primarily about [his] algebra teacher . . . and . . . principal”, *id.*, and his German language teacher. *Id.* n.2. Although he placed a disclaimer on his site prohibiting viewers from telling any school district employees about the site, eventually, the principal and the two teachers, as well as a large portion of the school community, saw the contents of the site. *Id.* Along with garden-variety teenage insults to the various educators, *J.S.* included an unusual request: “Take a look at the diagram and the reasons I gave [for why the algebra teacher should die], then give me \$20 to help pay for the hitman.” *Id.* After viewing this site, the principal contacted the police and the FBI, believing the “threats to be serious,” but both agencies declined to prosecute. *Id.* The principal also informed the teachers of the existence of the site. *Id.* at 852.

Shortly thereafter, the algebra teacher “applied for and was granted a medical leave” for the remainder of the school year because she “was frightened, fearing that someone would try to kill her.” *Id.* She suffered a variety of stress-induced conditions, including migraines, “short-term memory loss and an inability to go out of the house and mingle with crowds.” *Id.* The German language teacher similarly was unable to finish the school year, presumably as a result of the teacher’s reaction to the website, although the case does not elaborate on this point. *Id.* at 869 n.15. The school was required to hire four substitute teachers (three for the algebra class and one for the German class) to finish out the remaining months in the school year. *Id.* at 852 & 869 n.15.

The school did not discipline J.S. at the time they found the website (in approximately May 1998), nor did school authorities request that he remove the site from the web.¹¹ *Id.* at 852. Instead, after the end of the school year (in late July 1998), J.S.’s parents were informed that he would be suspended for three-days at the beginning of the next school year, citing the website and the violations of the student policy manual attributed to it. Following a hearing shortly thereafter, the suspension was increased to ten days; after a second hearing, the punishment was advanced to a full expulsion. *Id.* at 852-53. J.S.’s parents filed suit on his behalf against the school district arguing that the expulsion was in violation of the First Amendment. *Id.* at 853. Both at the trial court level and the intermediate appellate level, the courts concluded that the school district did not violate J.S.’s rights to free speech. *Id.*

On appeal, the Pennsylvania Supreme Court similarly concluded that the expulsion was justified, based not directly on the threatening nature of the speech, but instead on the level of disruption created at the school. *Id.* at 869. The Court first determined that the speech on J.S.’s website, while threatening in nature, did not constitute a “true threat,” which would strip the speech of its First Amendment protections. *Id.* at 859-60 (“To allow J.S. to attend class and extracurricular activities, even if during an investigation, and to only commence discipline well after the conclusion of the school year, severely undermines the School District’s position that the web site contained a true threat. . . . Thus, we hold that the web site did not contain true threats, as that term is defined by the prevailing case law.”).

Instead, the Court applied the *Tinker* standard, as refined by *Fraser* and *Kuhlmeier*, to analyze whether the conduct “materially disrupts classwork or involves substantial disorder or

¹¹ Apparently, J.S. removed the site on his own approximately one week after the principal became aware of the site, although the school did not request that he do so. *Id.* at 852.

invasion of the rights of others.” *Id.* at 861 (citing *Tinker*, 393 U.S. at 513). The Court recognized that the “disruption” could not be merely “undifferentiated fear or apprehension of disturbance,” but must involve a *substantial* “disruption, disorder or invasion of rights.” *Id.* Noting the substantial adverse impact suffered by the teachers (personally) and the students as a whole (based on the loss of two teachers near the end of the school year), the Court upheld the expulsion, stating:

In sum, the web site created disorder and significantly and adversely impacted the delivery of instruction. Indeed, it was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval. Based upon these facts, we are satisfied that the School District has demonstrated that J.S.'s web site created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*. Thus, for the reasons stated above, we find that the School District's disciplinary action taken against J.S. did not violate his First Amendment right to freedom of speech.

Id. at 869 (describing the disruptions to “the entire school community—teachers, students and parents”).

B. Schools May Censor to Prevent Violence

Despite the U.S. Supreme Court’s acknowledgement that students do not leave their constitutional rights “at the schoolhouse gate,” *Tinker*, 393 U.S. at 506, courts have held that student speech can cross the line from mere expression into inciting violence in schools or causing other harm to students and/or educators. Indeed, students do not have unfettered rights to free expression and certain regulation is appropriate under certain circumstances. *Id.* at 513 (concluding that students’ free speech rights are not absolute); *Kuhlmeier*, 484 U.S. at 266 (same); *Fraser*, 478 U.S. at 682 (same).

For instance, as mentioned above, threatening speech is not protected under the First Amendment and may be censored without violating the speaker’s civil rights. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371 (9th Cir. 1996) (considering a student’s in-person

threats against her guidance counselor, the court noted that “[i]n general, threats are not protected by the First Amendment.”); *J.S.*, 807 A.2d at 856 (recognizing that “a true threat . . . receives no constitutional protection from regulation”).

Similarly, a school’s failure to prevent such expression that resulted in violence (or a threat of violence) may be actionable. *See LaVine v. Blaine Sch. Dist.*,¹² 257 F.3d 981, 989 (9th Cir. 2001) (“In fact, [schools] have a duty to prevent the occurrence of disturbances.”) (quoting *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973) (relating to signs protesting renewal of teaching contract)); *see also Lovell*, 90 F.3d at 374 (acknowledging that the prevalence of violence in schools requires “teachers and administrators . . . [to] take threats by students very seriously”).

Although the anticipated disruption must be substantial, courts do not require school districts to wait until they have proof of an actual disruption in the educational environment before disciplinary actions taken to quell the threatening speech will be upheld. *See LaVine*, 257 F.3d at 989 (“*Tinker* does not require school officials to wait until disruption actually occurs before they may act.”); *J.S.*, 807 A.2d at 868 (recognizing that “complete chaos is not required for a school district to punish student speech”). Nor must school officials be *certain* “that disruption will occur, ‘but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.’” *LaVine*, 257 F.3d at 989 (quoting *Karp*, 477 F.2d 171).

¹² Shortly after the school shooting at Columbine, an eleventh-grade high school student wrote a poem called “Last Word” from the perspective of the teenager driven to shoot his fellow students and his teachers at school and then to commit suicide. Within a few days of showing this to his teacher in class for comment, various teachers, counselors and administrators met to discuss their concerns about this poem, the environment in which it was written and the potential responses. *LaVine*, 257 F.3d at 984-85. They concluded that it was necessary to temporarily expel LaVine in order to protect him and other students from harm. *Id.* at 985, 991. Because the educators were acting on the belief that a legitimate threat of school violence was presented, the Court upheld the expulsion. *Id.* at 990.

The finding of “substantial disruption” – or at least the ability to forecast such disruption – is critical, and an absence of such a finding may subject the school board to additional liability. See *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002) (“*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.”) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (finding that discipline for comments on student web page was inappropriate where school officials did not fear disruption or interference with school discipline, but were merely “upset” by student’s comments).

C. School-Sponsored Speech can be Restricted

Schools may properly regulate student speech that bears the imprimatur of the school and can be interpreted as stating the public position of the school. For instance, schools clearly have a right to censor speech in school-sponsored publications if the speech is “vulgar, lewd, obscene, or plainly offensive.” *Fraser*, 478 U.S. at 683-84 (affirming discipline of student who delivered a “lewd” speech riddled with sexual innuendo at a “required attendance” school assembly); *Kuhlmeier*, 484 U.S. at 273 (recognizing school’s right to censor articles published in school newspapers, stating, “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

Similarly, the Ninth Circuit has recognized that school officials have “a duty to prevent the occurrence of disturbances.” *Chandler*, 978 F.2d at 529 (citations omitted). “Indeed, because of the special circumstances of the school environment, the level of disturbance required to justify official intervention is lower inside a public school than it is outside the school.” *LaVine*, 257 F.3d at 990 (citing *Karp*, 477 F.2d at 175). Moreover, courts have “granted

educators substantial deference as to what speech is appropriate.” *LaVine*, 257 F.3d at 988; *see also Kuhlmeier*, 484 U.S. at 267 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts.”).

D. Some Speech Created “Off Campus” After Hours May be Regulated

Certain courts have attempted to define boundaries for regulating student speech by limiting such regulation to the geographic confines of school property. In other words, did the speech at issue occur on- or off-school grounds?¹³ While this boundary may be relevant in the context of pamphlets or booklets that are distributed physically outside of school grounds, this analysis is less probative when the physical location of the Internet can be simultaneously within someone’s home and within a public school classroom. *See J.S.*, 807 A.2d at 863-64 (acknowledging that “the advent of the Internet has complicated analysis of restrictions on speech”) (citing *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (plurality) (considering constitutionality of the Child Online Protection Act (“COPA”), 47 U.S.C. § 231 (1994 ed., Supp. V)); *Servance*, *supra*, at 1235 (“Unlike traditional forms of speech, Internet content is not limited by geography.”). The content of the communication is the same, but the author of the communication was required to do nothing more in order to circulate that communication on school grounds. He (or she) merely had to post their communication on the Internet and allow others to access it. The different effect this communication may have in each of these environments (home vs. school) is profound, however, and requires that schools not be so restricted to regulating only speech physically created on school grounds or using school

¹³ *See Tinker*, 393 U.S. at 512-13 (“When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfere(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”) (citations omitted).

property. Certainly, when the audience becomes other school students and/or its educators, the situs of the speech can be deemed as “on campus.” *J.S.*, 807 A.2d at 865 (concluding that off-campus speech targeting the school could be deemed “on campus speech” for purposes of regulating the content the student’s speech).

In cases where the speech takes place in a physical locale, identifying the appropriate “community standard” by which phrases like “plainly offensive” can be defined may make some sense. *See ACLU v. Reno*, 929 F. Supp. 824, 856 (E.D. Pa. 1996) (finding the Communications Decency Act of 1996 unconstitutional, concluding that legal standards of “indecent” and “patently offensive” are “inherently vague, particularly in light of the government’s inability to identify the relevant community by whose standards the material will be judged”); *compare with Ashcroft v. ACLU*, 535 U.S. at 585 n.16 (concluding that “COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render[] the statute substantially overbroad for purposes of the First Amendment”) (emphasis in original). However, once the geographic locale for the creation of this type of student speech, and for transmission to the ultimate audience, becomes based on the Internet, identifying the appropriate “community standard” may be difficult at best.

In instances where the off-campus speech at issue is merely “offensive,” and not alleged to pose a true threat to the safety of students or teachers or to cause the school district to reasonably fear substantial disruption at the school, the school district may not discipline the student who created the speech without violating the First Amendment. *See Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 705 (W.D. Pa. 2003) (concluding that discipline for an “abusive, offensive, harassing or inappropriate expression [posted by the student on a web message board about his own school’s volleyball team] that occurs outside of school premises

and not tied to a school related activity” was inappropriate); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (in the absence of evidence that student contributions to web site disrupted school activities or were created on school property; school district’s discipline of student violated First Amendment); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d, 446, 455 (W.D. Pa. 2001) (where there is no evidence of a true threat, a substantial disruption or even a substantial reason to anticipate a disruption, school district may not restrict or punish a student’s off-campus, personal web site containing criticisms of the school); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (concluding that speech created entirely off campus without any evidence of disruption at school could not be censored by school, even where the mock obituaries the student posted on a web site were an off-shoot of a school assignment).

Alternatively, where student speech created off-campus has a profound impact on the educational environment of the school, that speech can be restricted, or the student can be disciplined otherwise, without offending the First Amendment. *J.S.*, 807 A.2d at 865 (“[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”); *Servance, supra*, at 1235 (arguing that “off-campus websites almost invariably become the equivalent of on-campus speech when a student or faculty member accesses it on a school computer or when students discuss the content at school”).

E. Schools May Censor if Necessary to Promote School’s Educational Mission

The U.S. Supreme Court has held that public schools were created to “inculcate fundamental values necessary to the maintenance of a democratic political system.” *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Among these values are the “habits and manners of civility . . . conducive to happiness and . . . indispensable to the

practice of self-government in the community and the nation.” *Id.* (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)); *see also J.S.*, 807 A.2d at 855 (recognizing that “[s]chools are given the monumental task of molding our children into responsible and knowledgeable citizens”).

Accordingly, the Supreme Court has upheld a school’s ability to limit student speech that would “undermine the school’s basic educational mission.” *Fraser*, 478 U.S. at 681; *see also Kuhlmeier*, 484 U.S. at 266 (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission.’”).

The school district may legitimately require that its own publications meet certain basic standards to demonstrate that educational purpose. *See Kuhlmeier*, 484 U.S. at 271-72 (“[A] school may in its capacity as publisher of a school newspaper or producer of a school play ‘disassociate itself’ . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”); *Fraser*, 478 U.S. at 685-86 (“[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”)

IV. Conclusion

Courts are slowly grappling with the infiltration into daily life of the Internet, and only gradually in the context of school district liability. In many cases, existing precedent does not apply easily to the Internet and has to be adapted in order to suggest the course that the legal system may take. Historically, schools have been entrusted to cope with challenges posed by industrial development (*e.g.*, requiring the education of children through the age of 16) and should be permitted to cope with the challenges posed by technological advances. In the interest

of preparing for a more developed legal regime into which Internet use might fall, schools should endeavor to

- 1) Implement an Internet safety policy and use it in a way that fosters educational growth using the Internet as a tool;
- 2) Set standards for the use of filtering technology that require some human judgment as to what content is appropriate to restrict from children's use, consistent with the community's values;
- 3) Permit teachers to use the Internet as an interactive teaching tool, by developing classroom-focused blogs (monitored by the teachers who created them); and
- 4) Perhaps above all else, carefully balance students' free expression rights against a school's interests in fostering a safe school environment before disciplining students for statements they may make in various forms of online communications, especially if those statements "offend" the school district, but do not demonstrate any risk of substantial disruption to the school environment.

Schools have a profound opportunity to shape our children into productive, law-abiding citizens and have at least a moral obligation to keep them safe in the process. The Internet is a valuable tool to communicate educational values to students and schools should be permitted to use it for "everything it's worth," but at the same time, should take care to avoid chilling student speech or preventing students the opportunity to self-develop into responsible community participants.